

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOHN B. ROBBINS, JUDGE

DIVISION IV

CACR 06-852

JUNE 27, 2007

TOMMY LEE HORNE
APPELLANT

APPEAL FROM THE CRITTENDEN
COUNTY CIRCUIT COURT
[NO. CR2003-159]

V.

HONORABLE DAVID N. LASER,
JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED; MOTION TO BE
RELIEVED GRANTED

Appellant Tommy Lee Horne was placed on probation for six years commencing on May 12, 2003, for having committed sexual indecency with a child. Appellant agreed to abide by certain conditions set forth by the Crittenden County Circuit Court. The State petitioned to revoke his probation on February 17, 2006, alleging the following violations: that he failed to pay fines, costs, and fees as directed; that he failed to report to his probation officer as directed; that he failed to pay his probation fees or to notify law enforcement authorities of his current address and employment; that he associated with criminals; that he possessed cocaine with intent to deliver; that he possessed marijuana with intent to sell; and that he failed to register as a sex offender. His counsel filed a timely notice of appeal after the trial court found him guilty of violating his probation.

Defense counsel has submitted to our court a no-merit appeal brief and a motion to be relieved as counsel asserting that there is no non-frivolous argument to be made in support of an appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), and Ark. Sup. Ct. R. 4-3(j)(1)(2007). Appellant was notified of his counsel's actions, and he filed no pro se points for reversal. The State, via the Attorney General's Office, has indicated that it chose not to file a brief because there was no response entered by appellant. After consideration of this appeal under the proper standards, we affirm the revocation, and we grant counsel's motion to be relieved.

Anders v. California, 386 U.S. 738 (1967) and Arkansas Supreme Court Rule 4-3(j)(1) set requirements for the withdrawal of counsel for a defendant in a criminal case after a notice of appeal has been filed on the basis that an appeal is without merit. Under the rule, a court-appointed attorney who wishes to withdraw from an appeal must abstract and brief all of the rulings that were adverse to the appellant. In the present appeal, appellant's counsel demonstrates to us that the record contains two adverse evidentiary rulings¹ during the course of this revocation hearing but that neither would support any non-frivolous argument for reversal. Furthermore, counsel explains that the trial court found appellant guilty of several violations of his probation, and that sufficient evidence supports finding a violation of at least one of those violations.

¹Appellant's counsel actually states that there are five adverse evidentiary rulings, but our review of the record reveals that two of those rulings were sustained in favor of the defense's position. Appellant's counsel failed to obtain a ruling on another of the objections, which is a failure to preserve the issue for review.

Before we begin discussion of the adverse evidentiary rulings, we state that Rules of Evidence are not strictly applicable in revocation proceedings, with certain exceptions not applicable herein. See *Caswell v. State*, 63 Ark. App. 59, 973 S.W.2d 832 (1998). Nonetheless, for the sake of thoroughness, we examine each ruling.

The first adverse ruling came about when the State asked an officer, who took part in the execution of the search warrant at a residence in which appellant was residing, about whether appellant was present in an earlier controlled drug purchase. Defense counsel objected that there lacked relevance² for such a question because “there is no charge based on any sale.” The judge overruled the objection on the basis that the officer had verified in earlier testimony that he could recognize appellant’s voice and this was what led to the search warrant and the finding of contraband. This was not an abuse of discretion.

Arkansas Rule of Evidence 401 states, “‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Arkansas Rule of Evidence 402 states that “all relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible.” A ruling on the relevancy of evidence is discretionary and will not be reversed absent an abuse of discretion. *Cobb v. State*, 340 Ark. 240, 246-47, 12 S.W.3d 195, 199 (2000). Again, while the Rules of Evidence are

²Defense counsel’s brief characterizes this objection as one concerning foundation. We do not agree, but this has no bearing on the outcome of the adverse ruling.

not strictly applicable, we see no abuse of discretion in any event because this testimony was relevant to why the officers sought to have appellant's residence searched.

The next adverse ruling arose during appellant's probation officer's testimony when he was asked how many probationers lived in the same apartment complex as appellant. Defense counsel objected on the basis of relevancy, which was overruled. In this case, appellant was accused of associating with criminals. The probation officer's testimony was relevant to that issue. Thus, no non-frivolous argument could be raised on appeal as to this ruling.

Moving to the sufficiency of the evidence to revoke, the State sought to establish the above-noted violations of probation. The trial court ultimately found appellant to have violated the conditions related to possessing cocaine and marijuana; failing to pay fines, costs and fees; and associating with criminals. Any one violation would support the revocation. *See Brock v. State*, 70 Ark. App. 107, 14 S.W.3d 908 (2000).

The State presented evidence that appellant failed to pay toward his fines, costs, and fees. Appellant offered no reasonable excuse for this failure. This alone would be enough to support revocation. In addition, the State presented testimony that marijuana and cocaine were found in appellant's current residence. The trial court deemed this sufficient proof of at least constructive possession of contraband, if not actual possession. This, too, more than supports the sufficiency of the evidence by a preponderance standard to revoke his probation.

Affirmed; motion to be relieved granted.

PITTMAN, C.J., and HEFFLEY, J., agree.

